

No. 13773

United States
Court of Appeals
for the Ninth Circuit.

HOWARD BEST,

Appellant,

vs.

HENRY A. POWIS, JEANNETTE M. REYNOLDS, as Administratrix With the Will Annexed of the Estate of HARRY V. REYNOLDS, Substituted in the Place and Stead of HARRY V. REYNOLDS and A. E. TIERNEY,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

MAY 27 1953

PAUL R. O'SHANAHAN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

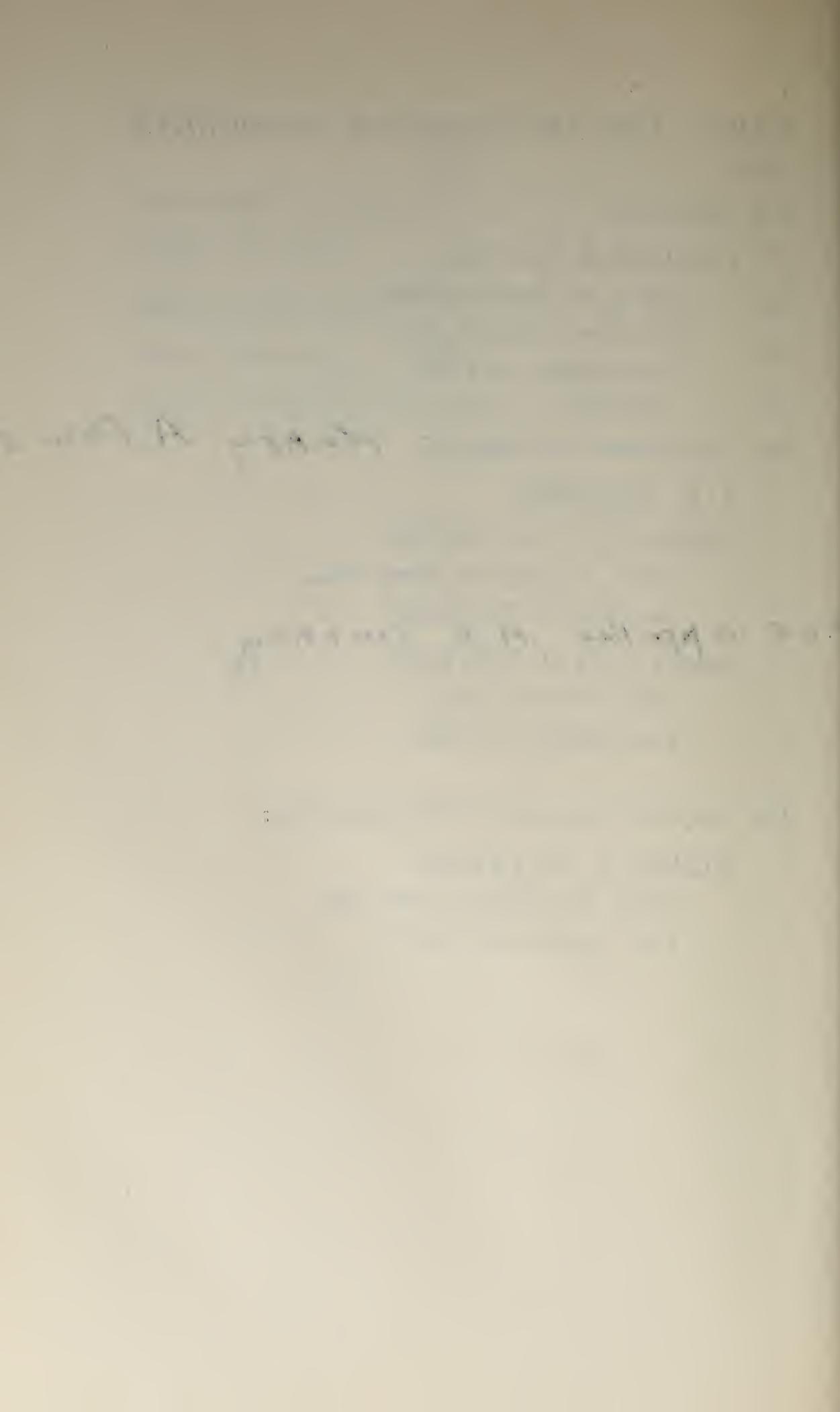
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For Appellee A. E. Tierney: *Henry A. Powis*

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ELMER J. WALTHER,
621 S. Spring St., Suite 400,
Los Angeles 14, Calif.



United States District Court, Southern District of California, Central Division

No. 13,583-T Civil

HOWARD BEST,

Plaintiff,

vs.

HENRY A. POWIS, JEANNETTE M. REYNOLDS as Administratrix With the Will Annexed of the Estate of HARRY V. REYNOLDS, Substituted in the Place and Stead of HARRY V. REYNOLDS, and A. E. TIERNEY,

Defendants.

SECOND AMENDED COMPLAINT FOR DAMAGES FOR FRAUD AND DECEIT

After leave of Court first had and obtained, plaintiff files this, his Second Amended Complaint, and complains and alleges:

1. Plaintiff is a citizen of the State of Utah. Henry A. Powis is a citizen of the State of California. Harry V. Reynolds, at the time of the commencement of this action, was a citizen of the State of California, has since deceased, and by stipulation and order Jeannette M. Reynolds as Administratrix with the Will Annexed of the Estate of Harry V. Reynolds has been substituted as a party defendant in the place and stead of Harry V. Reynolds; said Jeannette M. Reynolds is a citizen of the State

of California, and the Estate of Harry V. Reynolds, deceased, is pending in the Superior Court of [2*] the State of California, in and for the County of Los Angeles. A. E. Tierney is a citizen of the State of California.

2. The amount in controversy in this action exclusive of interest and costs exceeds the sum of \$3,000.00.

3. At all times herein mentioned:

(a) The Reypo Corporation was a corporation organized and existing under the laws of the State of California, having its principal place of business in the County of Los Angeles, State of California.

(b) Each original defendant herein was a director of said corporation and during the year 1947 and all thereof the living defendants and said Reynolds collectively constituted the entire Board of Directors of said corporation.

(c) Defendant Henry A. Powis was president of said corporation.

(d) Harry V. Reynolds, now deceased, was vice president of said corporation.

(e) To and including February 16, 1948, defendant A. E. Tierney was secretary of said corporation.

4. At various times during the four months preceding June 17, 1947, in the County of Los Angeles, State of California, the living defendants and said

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Reynolds, for the purpose of inducing plaintiff to purchase shares of the Reypo Corporation, orally represented to plaintiff that said corporation had obtained a permit from the Corporation Commissioner of the State of California authorizing it to sell and issue its shares for cash to plaintiff and others; that said permit would expire on June 17, 1947; and that if plaintiff desired to purchase shares of said corporation he must pay the full purchase price in cash on or before said date.

5. During said period the Reypo Corporation did in fact hold a permit issued by the Commissioner of Corporations of the State of California on or about December 17, 1946, which authorized said corporation to sell and issue an aggregate of not to exceed 47,810 of its shares at par for cash to members of the general public, but only [3] upon condition that all payments for said shares, less certain authorized selling expense, be delivered to and held as an escrow by an approved depositary pending the further order of said Commissioner. No such further order has ever been made limiting or affecting said condition. Such permit, by its terms, terminated and expired on June 17, 1947.

6. On or about June 17, 1947, the living defendants and said Reynolds caused the Reypo Corporation to sell to plaintiff 10,000 shares of the stock of said corporation of the par value of \$10,000.00 and to accept and receive from plaintiff the sum of \$10,000.00 therefor. The living defendants and said Reynolds did not deliver, or cause the Reypo Cor-

poration to deliver, said \$10,000.00 or any part thereof to the depositary designated by the said Commissioner of Corporations pursuant to such permit of December 17, 1946, but, on the contrary, caused said corporation to use and expend the same during the months of June, July, and August, 1947, to pay for current operations and to meet current obligations of said corporation.

7. In so doing, the living defendants and said Reynolds concealed and suppressed from plaintiff the condition imposed by the terms of said permit of December 17, 1946, as hereinabove alleged, and the fact that said sale of June 17, 1947, was in violation of such condition; and plaintiff purchased said shares in good faith, relying upon the representations made to him as aforesaid and upon the honesty and integrity of the living defendants and said Reynolds, and in the belief that such sale was valid and proper under the terms of said permit.

8. As a subterfuge and scheme and in order to avoid the disclosure in the records of the Reypo Corporation of a sale in violation of the condition imposed as aforesaid in the permit of December 17, 1946, the living defendants and said Reynolds, at the time of said sale to plaintiff, withheld issuing a share certificate reflecting his ownership of 10,000 shares of the Reypo Corporation, [4] and instead delivered to him a document purporting to be the promissory note of said corporation in the sum of \$10,000.00 providing for payment after thirty days with interest at 6% per annum and caused the

Reypo Corporation to reflect said sale to plaintiff on its records as a loan by plaintiff to said corporation upon the terms of said purported promissory note.

9. In so doing, it was the purpose and intent of the living defendants and said Reynolds that said purported promissory note should not constitute a valid or enforceable obligation of said corporation; and in delivering it to plaintiff as aforesaid, the living defendants and said Reynolds explained to him that there would be some delay in issuing a share certificate reflecting his ownership of 10,000 shares of the stock of the Reypo Corporation, that the purported promissory note was delivered to him to serve as a receipt for the \$10,000.00 paid as aforesaid until a share certificate was issued to him, and that when such a certificate should be issued plaintiff would be expected to surrender and cancel said purported promissory note in return therefor without at any time demanding any interest or principal payment thereunder.

10. Plaintiff accepted said purported promissory note in good faith, without knowing that the living defendants and said Reynolds were using it as a subterfuge and scheme as aforesaid, and in the belief that the delay in issuing a share certificate to him was due to some technical corporate requirement with which plaintiff was unfamiliar. At the time of said sale plaintiff had recently become a resident of the State of California and had no knowledge of the Corporate Securities Act of said

State, the regulations promulgated thereunder, or the requirements in California concerning the issuance of a certificate reflecting stock ownership in a corporation.

11. As a further part of said subterfuge and scheme, and for the purpose alleged in paragraph 8 hereof, the living defendants and said Reynolds in June, 1947, caused the Reypo Corporation to apply to [5] said Commissioner of Corporations for a new permit authorizing it to sell and issue its shares to certain named persons including plaintiff. Pursuant to such application, said Commissioner of Corporations issued to the Reypo Corporation a permit authorizing it to sell and issue to said persons an aggregate of not to exceed 40,000 of its shares, but required that any sale or issuance of shares thereunder be made at par for cash in such manner that said corporation would net the full amount of the selling price of such shares.

12. Subsequently, on or about December 23, 1947, the living defendants and said Reynolds caused the Reypo Corporation to issue to plaintiff its share certificate No. 63 reflecting ownership in plaintiff of 10,000 shares of the stock of said corporation and, as the sole consideration therefor, demanded and received from plaintiff the return and cancellation of the purported promissory note executed as aforesaid.

13. In so doing, the living defendants and said

Reynolds suppressed and concealed from plaintiff, and until September, 1951, he was unaware of the fact of such application for a new permit and the existence, terms and conditions of said permit of September 4, 1947, and particularly the fact that a permit had been obtained after said sale of shares to plaintiff which affected said sale and which required that any sale or issuance of shares pursuant to such permit be made at par for cash in such manner that Reypo Corporation would net the full amount of the selling price of said shares. In accepting said share certificate and returning and cancelling said purported promissory note, plaintiff acted in good faith, in reliance upon the honesty and integrity of the living defendants and said Reynolds, and in the belief that said action on his part was entirely proper and valid.

14. As a further part of the subterfuge and scheme hereinabove alleged, and for the purpose alleged in paragraph 8 hereof, the living defendants and said Reynolds concurrently with the issuance of [6] said share certificate on or about December 23, 1947, caused the Reypo Corporation to make appropriate entries in its corporate records purporting to show (1) payment in full of the obligation represented by said promissory note; (2) the occurrence, at that time, of a sale to plaintiff of 10,000 shares at par for cash; and (3) the receipt by said corporation, at that time, of the full purchase price of \$10,000.00 for said shares.

15. In making and engaging in the actions, rep-

resentations, suppressions, concealments, subterfuges, and schemes alleged in paragraphs 4 to 14 inclusive, of this Second Amended Complaint, it was the purpose and intent of the living defendants and said Reynolds to defraud plaintiff by obtaining from him on or before June 17, 1947, the sum of \$10,000.00 as the purchase price of 10,000 shares of the stock of the Reypo Corporation and by issuing to him a share certificate therefor, well knowing that said sale and issuance of shares was void and of no legal force or effect because, as hereinabove set forth, they were not made in accordance with the terms and conditions of any permit held by the Reypo Corporation. In so doing, the living defendants and said Reynolds, and each of them, acted with full knowledge of the terms and conditions of said permit of December 17, 1946, and since September 4, 1947, with full knowledge of the terms and conditions of the permit issued on said date.

16. At all times herein mentioned until September, 1951, plaintiff was wholly unaware of the fraud and deception practiced on him by the living defendants and said Reynolds, as hereinabove set forth, or of the invalidity of said sale and issuance to him of 10,000 shares of the stock of the Reypo Corporation. Plaintiff first learned of such fraud, deceit and invalidity under the following circumstances:

In July of 1947 plaintiff was appointed and actively entered upon his duties as sales representative of the Reypo Corporation for [7] the entire

territory of the State of California. During the course of his duties in such position, he necessarily had to and did travel continuously around and about the State of California, and a great portion of his time was spent in so travelling. During this period he had no access and no right to access to the books and records either of account or of the internal structure of the Reypo Corporation. During the Fall of the year 1947 the plaintiff, due to production difficulties encountered by the Reypo Corporation (which was in the business of manufacturing small sets of precision machine tools, such as drill presses, etc.), spent his daily work time in the factory of the corporation and performed manual labor in actual production work at the plant of said corporation. During this time also he had no access and no right of access to the books and records of the corporation. The stock was issued to him as aforesaid on or about December 23, 1947. After the completion of his production work in the said factory and after a return to normal production, he again resumed his position and duties as sales representative in California and again his business and work time was consumed in being outside of the plant and outside of the office of the corporation.

Upon January 6, 1948, at a regular meeting of the stockholders of the corporation, the plaintiff was personally present and was elected a director of said corporation. At said time and thereafter he retained his position as sales representative and, pursuant to the duties of said position, continued

to travel and to be outside of the office of the corporation during his said work and business time.

From January 6 to and including the 16th day of February, 1948, the plaintiff did not ever see any of the minutes of the corporation other than certain minutes of the stockholders meeting of January 6, 1948, which were signed by him as Acting Secretary, after having been prepared in his absence by some person now unknown to plaintiff.

That the Bylaws of the Reypo Corporation provided for regular [8] meetings of the directors on the fifteenth days of each calendar month. That upon the 15th day of January, 1948, no quorum appeared at the scheduled regular meeting of the Board of Directors for that month and the plaintiff so certified in the minute book of the corporation. That upon the 16th day of February, 1948, the plaintiff was duly elected and qualified as secretary-treasurer of said corporation and continued to hold said office thereafter.

That as such secretary-treasurer of the corporation, plaintiff was entitled to custody of all of the books and records of the corporation but, in fact, said books and records were kept at the office of the corporation and the plaintiff did not ever see those books, records and documents of the corporation pertaining to the application for said permit to issue stock filed in the Summer of 1947 nor the said permit to issue stock which was issued upon September 4, 1947, as aforesaid, and did not in fact know of the terms of said permit, nor of the whereabouts of said documents.

That plaintiff was, during all of this period, attempting to sell the products of the corporation, and was generally outside its office, and his duties as secretary-treasurer, which consisted of slight ministerial assistance to the active management of the corporation, required only a very small part of his time, and he at no time saw any of the aforesaid records and did not know of their whereabouts or of their existence. Plaintiff is informed and believes and therefore alleges that he was elected a director of the corporation and became an appointed secretary-treasurer thereof, among others, for the reason that he would thereby be sought to be charged with the knowledge of the corporate affairs to such an extent that the living defendants and said Reynolds might be exculpated from liability by such constructive knowledge, and that they actually concealed from plaintiff the facts herein alleged with reference to the issuance of said stock to plaintiff and that the same did not comply with the said permit to issue stock of September, 1947. [9]

Thereafter during the months from January, 1948, to and including November, 1948, the aforesaid situation existed, i.e., plaintiff was a director and secretary-treasurer of said corporation and at the same time was sales representative and engaged outside of the office of the corporation in doing his best to promote sales and to put said corporation upon its feet. Plaintiff had learned of the precarious financial condition of the corporation during or about December of 1947 and would not then have invested money, and believed he had bought such

stock in June of 1947, and plaintiff spent his best efforts and all of his working and business time in an attempt to restore said corporation to a sound financial position and paid no attention whatsoever to his own personal rights, or to the conditions surrounding the issuance of said stock, or the granting of said permit.

During the months of January to and including November, 1948, as aforesaid, the following meetings of the board of directors were held, at which plaintiff was present and at which only the following things, matters and proceedings were, in general, discussed:

February 16, 1948, regular meeting, plaintiff elected secretary-treasurer, and general discussion was held of the condition of the business.

March 15, 1948, regular meeting, during which a discussion was held concerning the inadequacy of quarters at 1233 Lincoln Blvd., Santa Monica, Calif., and new quarters were decided upon.

May 20, 1948, special meeting, during which the condition of the company was stated to the board of directors as being very precarious and general discussions were held concerning financing and the conduct of the business in the future.

July 15, 1948, regular meeting, during which discussion was had only as to the bad financial shape of the company and plans were considered to get more money into the company, if possible, and for the general management of the company. [10]

September 30, 1948, special meeting of stockholders for the purpose of establishing the present and

future policies of the corporation and to discuss and determine the advisability of offering for sale the complete development, including engineering patterns, prototypes, etc., of the production of the corporation, etc.

October 6, 1948, reconvened stockholders meeting for the further discussion of previous matters set forth at the prior meeting and to receive the report of the committee appointed by the stockholders at that meeting to investigate solutions for the company's situation and "Section 11."

October 11, 1948, reconvened meeting of the shareholders of September 30 and October 6, and a discussion of the possible course of bankruptcy.

November 2, 1948, special meeting of the Board of Directors wherein the president of the corporation was authorized either to sell all of the assets of the corporation to Marsden Associates or if unable to do so, to file a voluntary petition in bankruptcy.

November 15, 1948, regular meeting of the board of directors, at which time it was resolved that Howard Best, as secretary of the corporation (plaintiff herein) should be authorized to file a voluntary petition in bankruptcy in the above-entitled court.

That at no time during any of said meetings were the facts surrounding the issuance of plaintiff's stock ever mentioned, and plaintiff is informed and believes that this was a part of a purposeful concealment whereby plaintiff was prevented by the living defendants and said Reynolds from learning said facts.

That about said 15th day of November, 1948, for the first time, plaintiff took actual possession of all of the books, records and documents of and pertaining to said corporation and handed them to the attorney for the corporation for the purpose of preparing a voluntary petition in bankruptcy.

That thereafter and on or about the 18th day of November, 1948, [11] the said Reypo Corporation did file its certain voluntary petition in bankruptcy in this court and was thereupon adjudicated a bankrupt, in bankruptcy matter numbered 46697 in the office of the clerk of this court.

That thereupon a receiver was appointed and thereafter a trustee was appointed. That immediately upon the appointment of said receiver, all of the books, records and documents of and pertaining to said corporation were handed to said receiver who thereafter had complete custody thereof, and thereafter said books, records and documents were handed to the trustee in bankruptcy. Said trustee in bankruptcy retained possession thereof until August, 1951, when, after completion of the entire bankruptcy proceedings with reference to said corporation, they were returned to plaintiff as secretary of said corporation. Plaintiff at no time hereinabove mentioned even suspected that his said stock had been issued to him in any way in violation of the terms of said permit of September 4, 1947, and did not have actual knowledge thereof until September, 1951, as hereinafter set forth.

In September, 1951, he contacted his present attorney of record to determine whether, under Cali-

fornia law, corporate directors owed any duty to prospective purchasers of shares in a corporation to disclose fully to them the inadequate financial condition of the corporation before making any sale of shares to them and, if so, whether under the facts and circumstances related by him to said attorney there was any breach of such duty on the part of the living defendants and said Reynolds which would give rise to a cause of action on his part against them; said attorney thereupon made an investigation of the affairs and records of the Reypo Corporation and, upon ascertaining the terms and conditions of said permits of December 17, 1946, and September 4, 1947, also examined the files and records of the California Commissioner of Corporations relating to said corporation; at the conclusion of such investigation and examination, said [12] attorney informed plaintiff, and plaintiff then learned for the first time, of the terms and conditions of said permits, of the requirements and provisions of the California Corporate Securities Act and the regulations promulgated thereunder, of the invalidity thereunder of said sale and issuance of shares to him, and of the fraud and deceit practiced upon him by the living defendants and said Reynolds, as aforesaid.

That, as aforesaid, plaintiff first obtained actual custody and possession of said books and records for a short period of time in November, 1948, and has commenced this action within three years thereafter.

17. The actual value of that with which plaintiff parted is the sum of \$10,000.00 paid by him for shares of stock in the Reypo Corporation as aforesaid. Plaintiff received nothing of value from the foregoing transactions, or any of them, and was therefore damaged in the premises in the sum of \$10,000.00.

Wherefore, plaintiff prays for judgment against the living defendants and Jeannette M. Reynolds as Administratrix with the Will Annexed of the Estate of Harry V. Reynolds, substituted in the place and stead of Harry V. Reynolds, and each of them, in the sum of \$10,000.00 together with legal interest thereon from and after June 17, 1947; for his costs herein incurred; and for such other and further relief as may be just and proper.

/s/ GEORGE R. MAURY,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 28, 1952. [13]

[Title of District Court and Cause.]

MOTION TO DISMISS SECOND AMENDED
COMPLAINT AND MOTION FOR SUM-
MARY JUDGMENT

Defendant Jeannette M. Reynolds, as Administratrix With the Will Annexed of the Estate of Harry V. Reynolds, substituted in the place and

stead of Harry V. Reynolds, deceased, moves to dismiss the above-entitled action and, in lieu thereof, for a summary judgment in favor of defendants and against plaintiff, upon the following grounds:

1. Because the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.
2. Because the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted in that it appears therefrom that, if plaintiff ever had a cause of action against this defendant, it is barred by the Statute of Limitations, to wit, California Code of Civil Procedure, Section 338, Subdivision 1, providing a three-year statute of limitations in an action upon a liability created by statute other than a penalty or [15] forfeiture.
3. Because the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted, in that it appears therefrom that, if plaintiff ever had a cause of action against this defendant, it is barred by the Statute of Limitations, to wit, California Code of Civil Procedure, Section 338, Subdivision 4, providing a three-year statute of limitations in actions for relief upon the ground of fraud.
4. Because the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted, in that it appears therefrom that, if plaintiff ever had a cause of action against

this defendant, it is barred by the Statute of Limitations, to wit, California Code of Civil Procedure, Section 359, providing a three-year statute of limitations in actions against directors of a corporation to enforce a liability created by law.

5. Because the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted, in that it appears therefrom that, if plaintiff ever had a cause of action against this defendant, it is barred by the Statute of Limitations, to wit, California Code of Civil Procedure, Section 339, Subdivision 1, providing a two-year statute of limitations in an action upon a contract, obligation or liability not founded upon an instrument of writing.

6. Because it appears from the face of the Second Amended Complaint that Reypo Corporation is an indispensable necessary party to the full and final adjudication of this controversy, and it has not been made a party hereto.

7. That plaintiff's alleged cause of action is barred by laches.

Dated: September 22, 1952.

/s/ ELMER J. WALTHER,
Attorney for Defendant Jeannette M. Reynolds, as
Admx. w/w/a of the Estate of Harry V. Reynolds, Deceased. [16]

Notice of Hearing

To: George R. Maury, Esquire, 435 Bartlett Building, 215 West Seventh Street, Los Angeles 14, California, Attorney for Plaintiff:

Please Take Notice, that the undersigned will bring the Motion to Dismiss Second Amended Complaint herein on for hearing before the above-entitled Court in the courtroom of the Honorable Ernest A. Tobin, Judge Presiding, Second Floor, United States Courthouse and Post Office Building, Los Angeles, California, on the thirteenth day of October, 1952, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard.

This Motion will be based upon Points and Authorities filed herewith, the Affidavits of Manley C. Davidson, Henry A. Powis, and A. E. Tierney filed with and in support of Motions of Henry A. Powis and A. E. Tierney to Dismiss the Demand for Admission of Facts and Genuineness of Documents filed by defendants Henry A. Powis and A. E. Tierney and the Reply of plaintiff thereto, and the records, files and pleadings now on file in said action.

Dated: September 22, 1952.

/s/ ELMER J. WALTHER,
Attorney for Defendant Jeannette M. Reynolds, as
Administratrix With Will Annexed of the
Estate of Harry V. Reynolds, Decreased.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 24, 1952. [17]

[Title of District Court and Cause.]

MOTION OF DEFENDANTS HENRY A.
POWIS AND A. E. TIERNEY TO DISMISS
SECOND AMENDED COMPLAINT

Henry A. Powis and A. E. Tierney, defendants in the above-entitled action, move to dismiss the second amended complaint and said action, or in the alternative for a summary judgment for them upon the grounds that these moving defendants are entitled to a judgment in their favor as a matter of law.

Said motion will be made upon the grounds hereinafter stated and these moving defendants will rely on the affidavits of Manley C. Davidson, Henry A. Powis and A. E. Tierney filed herein and incorporated as exhibits herein, the pleadings on file herein, the demand for admission of facts and genuineness of documents and the response to said demand made by the plaintiff herein, the points and authorities filed by the defendants herein in support of their motion to dismiss the first amended complaint, and the oral argument in support thereof, together with the points and authorities served and filed in [18] support of this motion:

1. Because the second amended complaint fails to state a claim against these defendants upon which relief can be granted.

2. Because the second amended complaint fails to state a claim against these defendants upon which relief can be granted, in that it appears there-

from that if plaintiff ever had a cause of action against these defendants, it is barred by the statute of limitations, to wit, California Code of Civil Procedure, § 338, subdivision 1, providing a three-year statute of limitations in an action upon a liability created by statute other than a penalty or forfeiture.

3. Because the second amended complaint fails to state a claim against these defendants upon which relief can be granted, in that it appears therefrom that if plaintiff ever had a cause of action against these defendants, it is barred by the statute of limitations, to wit, California Code of Civil Procedure, § 338, subdivision 4, providing a three-year statute of limitations in actions for relief upon the ground of fraud.

4. Because the second amended complaint fails to state a claim against these defendants upon which relief can be granted, in that it appears therefrom that if plaintiff ever had a cause of action against these defendants, it is barred by the statute of limitations, to wit, California Code of Civil Procedure, § 359, providing a three-year statute of limitations in actions against directors of a corporation to enforce a liability created by law.

5. Because the second amended complaint fails to state a claim against these defendants upon which relief can be granted, in that it appears therefrom that if plaintiff ever had a cause of action against these defendants, it is barred by the statute of

limitations, to wit, California Code of Civil Procedure, § 339, subdivision 1, providing a two-year statute of limitations in an action upon a contract, obligation or liability not founded upon an instrument in [19] writing.

6. Because it appears from the face of the second amended complaint that Reypo Corporation is an indispensable and necessary party to the full and final adjudication of this controversy, and it has not been made a party hereto.

7. That the second amended complaint does not allege facts sufficient to constitute a cause of action against these moving defendants.

8. That plaintiff's alleged cause of action and claim for relief is barred by laches, in that it appears that the plaintiff knew, or in the exercise of reasonable diligence should have known or discovered, the facts upon which his said cause of action is predicated for more than three years prior to the filing of the complaint herein.

Dated: September 22, 1952.

J. E. SIMPSON, and

MANLEY C. DAVIDSON,

By /s/ J. E. SIMPSON,

Attorneys for Henry A.
Powis, Defendant.

/s/ ROWLAND M. BUTLER,

Attorney for Defendant A. E.
Tierney.

Notice of Hearing

To George R. Maury, 435 Bartlett Building, 215 W. 7th Street, Los Angeles 14, California, Attorney for Plaintiff:

Please Take Notice, that the undersigned will bring the Motion to Dismiss Second Amended Complaint herein on for hearing before the above-entitled court in the courtroom of the Honorable Ernest A. Tolin, Judge Presiding, Second Floor, United States Courthouse and [20] Post Office Building, Los Angeles, California, on the 13th day of October, 1952, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard.

Dated: September 22, 1952.

J. E. SIMPSON, and
MANLEY C. DAVIDSON,
By /s/ J. E. SIMPSON,
Attorneys for Henry A.
Powis, Defendant.

/s/ ROWLAND M. BUTLER,
Attorney for Defendant A. E.
Tierney.

Receipt of copy acknowledged.

[Endorsed]: Filed September 25, 1952. [21]

[Title of District Court and Cause.]

**AFFIDAVIT OF A. E. TIERNEY IN SUPPORT
OF MOTION TO DISMISS PLAINTIFF'S
SECOND AMENDED COMPLAINT**

State of California,
County of Los Angeles—ss.

A. E. Tierney being first duly sworn on oath deposes and says: That at all times mentioned in plaintiff's Second Amended Complaint, up to and including December 23, 1947, affiant was the duly elected, qualified and acting Secretary and Director of Reypo Corporation; that during all of said time all of the books and records of said corporation including all applications for permits filed in the office of the Commissioner of Corporations of the State of California together with all permits issued by said Commissioner in response thereto were regularly kept in the corporate filing cabinets at the head office of said corporation and were available for inspection at all times by the officers, directors and stockholders of [23] said corporation; that as early as December 17, 1947, plaintiff assumed the duties of Treasurer of said corporation, took possession of the corporate ledgers and made entries therein; that at that time all of the corporate books and records above mentioned were kept in said corporate filing cabinets and were easily accessible to plaintiff; that on or about December 23, 1947, it was understood by all of the officers and directors of said corporation, including the plaintiff herein,

that affiant would and did immediately cease to act as Secretary and Director of said corporation and that plaintiff would and thereupon did assume the duties of such Secretary; that at that time affiant left the corporate minute books together with all of the other corporate books and records in said corporate filing cabinets and in the custody of the acting Secretary-Treasurer, to wit, the plaintiff herein; further your affiant sayeth not.

Dated : September 23, 1952.

/s/ A. E. TIERNEY.

Subscribed and sworn to before me this 23rd day of September, 1952.

/s/ RUTH P. McBEAN,
Notary Public in and for
Said County and State.

My Commission Expires May 27, 1953.

[Endorsed]: Filed September 25, 1952. [24]

[Title of District Court and Cause.]

AFFIDAVIT OF HENRY A. POWIS IN
SUPPORT OF MOTION TO DISMISS

State of California,
County of Los Angeles—ss.

Henry A. Powis, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action;

That during all of the times mentioned in plaintiff's Second Amended Complaint on file herein, affiant was the President and a Director of Reypo Corporation, the corporation mentioned in plaintiff's said Second Amended Complaint;

That Article IX of the Bylaws of said Reypo Corporation provides that the Secretary shall keep, or cause to be kept a book of minutes at the principal office or such other place as the Board of Directors may order, of all meetings of Directors and shareholders, and further requires that the Secretary shall keep, or cause to be kept, at the principal office or the office of the corporation's transfer agent, a share register or duplicate share register, showing the [25] names of the shareholders and their addresses, and the number and classes of shares held by each, the number and dates of certificates issued for the same, and the number and date of cancellation of each certificate surrendered for cancellation. That Article XII of the Bylaws of said Reypo Corporation provides that:

“Certificates of stock shall be of such form and device as the Board of Directors may direct, and each certificate shall be signed by the President or a Vice-President, and the Secretary.”

That at all times mentioned in Plaintiff's Second Amended Complaint, the provisions of said Bylaws of said Reypo Corporation, as aforesaid, were in effect and were not amended, altered, changed or repealed.

That on June 10, 1947, at a special meeting of the Board of Directors of said Reypo Corporation,

resolutions were duly adopted by the Board of Directors of said corporation, whereby said Board of Directors resolved that it was for the best interests of said corporation to abandon its efforts to further sell shares of its stock to the general public under the Permit of December 17, 1946, issued to said corporation, and to authorize the Commissioner of Corporations to release all sums impounded under the terms of said permit, which amounted to the sum of \$2,200.00, and authorizing affiant, as President of the corporation, to file an application for an amended and supplemental Permit for permission to sell and issue an aggregate of not to exceed 40,000 of its shares, at par for cash, lawful money of the United States, and without selling expense attached thereto, to certain persons named in an exhibit submitted to said meeting; and whereby it was further resolved that upon issuance of said amended and supplemental permit by the Commissioner of Corporations of the State of California, pursuant to such application or any amendment thereof, the "President or Vice-President and the Secretary of this corporation be and they are authorized and instructed to issue and/or sell the shares of this [26] corporation authorized to be issued and/or sold by said Permit, for the consideration stated and in compliance with all of the terms and conditions of such Permit."

That said minutes of said special meeting, as aforesaid, were, on or about the 10th day of June, 1947, placed in the Minute Book of said corporation

and at all times thereafter remained in said Minute Book; that pursuant to said resolutions, as aforesaid, an application was filed with the Commissioner of Corporations of the State of California, and that on or about September 4, 1947, an Amended Permit was issued by the Department of Investment of the Division of Corporations of the State of California to said corporation, a true and correct copy of which was attached to the "Demand for Admission of Facts and Genuineness of Documents," filed herein, in Demand numbered X thereof, which is by this reference incorporated herein as though fully set forth at length herein.

That said Minute Book contains the minutes of a regular meeting of the Board of Directors of said corporation held on June 16, 1947, wherein it is stated that this affiant stated that a loan for \$10,000.00 could be negotiated with Howard Best, the plaintiff in this action, and the Directors authorized the execution of a note of said corporation to said Howard Best for \$10,000.00 with interest at six per cent. That said Minute Book contains minutes of the Board of Directors meeting of August 15, 1947, wherein it is stated that this affiant recited to the Directors that a \$10,00.00 note had been executed in favor of Howard Best, the plaintiff in this action, to evidence such loan. That said minutes of June 16, 1947, and August 15, 1947, were in the Minute Book of said corporation and remained therein at all times from and after the holding of said meetings.

That prior to June 17, 1947, the said Reypo Corporation delivered to the plaintiff in this action a

true and correct copy of the Permit issued to said corporation by the Department of Investment, [27] Division of Corporations of the State of California, dated December 17, 1946, and plaintiff herein, by his response to Demand for Admission of Facts and Genuineness of Documents, admits his receipt from said corporation of a copy of said Permit; that in delivering to said plaintiff a copy of said Permit, as aforesaid, prior to June 17, 1947, the defendants could not have, and did not, on or about June 17, 1947, or at any other time, conceal or suppress from plaintiff any of the conditions imposed by the terms of said Permit, as alleged in plaintiff's Second Amended Complaint.

That the original Amended Permit, issued on or about September 4, 1947, a copy of which is annexed to paragraph X of the defendants' Demand for Admission of Facts and Genuineness of Documents, together with a copy of the application therefor, was at all times from and after the receipt by said Reypo Corporation of such documents, placed in the corporate files of said Reypo Corporation, and remained in such files at the office of Reypo Corporation until the same were delivered to the Trustee in Bankruptcy, as mentioned in plaintiff's Second Amended Complaint, and were at all times available and accessible to all of the officers, Directors and stockholders of Reypo Corporation; that plaintiff, at all times from and after the date he was made a Director of Reypo Corporation and from and after the date he was elected as the Secretary-Treasurer of said corporation, had access to all of the books,

records and files of Reypo Corporation, including the original of said Amended Permit of September 4, 1947, together with the copy of the application therefor, and at all of said times knew the place at which all of the books and records and files of said corporation were kept; that neither this affiant nor any of the other defendants hid or concealed said original Amended Permit of September 4, 1947, as aforesaid, or the copy of the application therefor, from plaintiff or any other person whomsoever, but in truth and in fact said original Amended Permit, as aforesaid, and the copy of the application therefor, were regularly filed in the corporate files of said [28] corporation and maintained there at all times from the receipt by said corporation to the time they were delivered to the Trustee in Bankruptcy as aforesaid, together with all of the other records and documents of said corporation; that at no time did affiant suppress or conceal from plaintiff the fact of such application for such Permit, or the existence, terms and conditions of said Permit of September 4, 1947; nor did this affiant conceal from plaintiff any of the facts in connection with the application for said Permit which was issued on September 4, 1947, or the fact of the issuance of said Permit of September 4, 1947.

That all of the entries in the corporate records mentioned in Paragraph 14 of plaintiff's Second Amended Complaint were made by plaintiff.

That neither this affiant nor any of the defendants had any purpose or intent to defraud plaintiff,

as alleged in paragraph 15 of said Second Amended Complaint, or at all.

That in connection with plaintiff's allegations appearing at page eight, lines twenty-three to twenty-nine, inclusive, that plaintiff "was elected a Director of the corporation and appointed Secretary-Treasurer thereof, among others, for the reason that he would thereby be sought to be charged with the knowledge of the corporate affairs to such an extent that the living defendants and said Reynolds might be exculpated from liability by such constructive knowledge," this affiant avers that he had no knowledge of any rule of law to the effect that the election and appointment of a Director and Secretary-Treasurer of the corporation imposed such constructive knowledge until affiant was so informed by his attorneys in this action, after the filing of this action.

That the Minute Book of said Reypo Corporation contains the minutes of a meeting of the Board of Directors of said corporation held on May 20, 1948, wherein it is stated, among other things, as follows:

"Mr. Best brought up the subject of disposing of [29] additional stock in order to manufacture Model Master Metalworker, which, he felt, offered better market possibilities than any of the other Reypo products and that if possible we should discuss disposing of Reypo stock through a promoter. In discussing this, it was pointed out that there was not enough Reypo stock available to interest a promoter and that in any event, it would be necessary

to obtain a new permit from the Corporation Commissioner to dispose of stock in this manner. Mr. Powis pointed out that there was not enough money available, from the sale of subject stock, as had been authorized, to even tool up for the Model Master Metalworker. The cost of tooling up this machine being estimated at \$25,000.00 or \$30,000.00, and expressed himself as being in favor of doing nothing further with the Metalworker until the Company was in position to invest that much money in tooling and patterns."

That the Mr. Best referred to in said minutes is the plaintiff in this action and said plaintiff acted as Secretary of said meeting and subscribed his name to such minutes.

That at all times from and after February 16, 1948, the date plaintiff was elected the Secretary-Treasurer of said corporation, said plaintiff had the custody of the Minute Book of said Reypo Corporation. That following election of plaintiff as treasurer of said corporation on February 16, 1948, said plaintiff was authorized to and did sign checks drawn by said corporation together with affiant.

That said plaintiff did, during the month of August, 1948, as Secretary of Reypo Corporation, sign stock certificate # 67, evidencing the ownership of 1,500 shares of Reypo Corporation in one John Bruecker, which stock certificate was, during said month [30] of August, 1948, delivered to said John Bruecker.

/s/ HENRY A. POWIS.

Subscribed and sworn to before me this 24th day of September, 1952.

[Seal] /s/ J. E. SIMPSON,
 Notary Public in and for
 Said County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed September 25, 1952. [31]

[Title of District Court and Cause.]

**AFFIDAVIT OF MANLEY C. DAVIDSON
IN SUPPORT OF MOTION TO DISMISS**

State of California,
County of Los Angeles—ss.

Manley C. Davidson, being first duly sworn, deposes and says:

That he is one of the attorneys of record for the defendant, Henry A. Powis, in the above-entitled matter.

That heretofore the defendants Henry A. Powis and A. E. Tierney did serve upon plaintiff herein, through his attorneys of record herein, a written Demand for Admission of Facts and Genuineness of Documents, which for purposes of brevity will hereafter be referred to as "Defendants' Demand," and that in response thereto plaintiff did serve upon said defendants, through their attorneys of record herein, a written Response to Demand for Admission of Facts and Genuineness of Documents, which

for purposes of brevity will hereafter be referred to as "Plaintiff's Response."

That Defendants' Demand numbered I stated as follows: [33]

"I.

"That the following is a true and correct photostatic copy of the original Permit issued to Reypo Corporation by the Department of Investment, Division of Corporations of the State of California on December 17, 1946, and is the same Permit that is referred to in paragraph 4 of plaintiff's First Amended Complaint."

That there then followed a true and correct photostatic copy of the original Permit issued to Reypo Corporation by the Department of Investment, Division of Corporations of the State of California on December 17, 1946, which was attached to said Defendants' Demand and which is by this reference incorporated herein as though fully set forth at length herein. That said Permit provides, among other things as follows:

"3(b). That none of the shares authorized by paragraph 2 hereof shall be sold or offered for sale unless and until said applicant shall have first selected a depositary, and said depositary shall have been first approved in writing by the Commissioner of Corporations.

"That until the further order of said Commissioner the full amount of each payment on account of subscriptions to said shares shall be paid to said applicant, and that each payment, less the selling expense authorized herein and actually paid, and a

statement showing the full name and address and the number of shares subscribed for by each subscriber, shall immediately be delivered by the applicant to and held as an escrow by said depositary pending the further order of said Commissioner.

“That there shall be deposited, subject to release in whole or in part in the discretion of said Commissioner, and upon such terms and conditions as he may deem advisable, with said depositary from bona fide subscriptions, the net sum of [34] \$38,-248.00 cash, lawful money of the United States, on or before the 17th day of June, 1947, provided, however, that said date may be extended by said Commissioner upon such terms and conditions as he may prescribe.”

That Plaintiff’s Response to said demand numbered I, as aforesaid, was: “Yes.”

That Defendants’ Demand numbered II was:

“That prior to June 17, 1947, plaintiff received from Reypo Corporation a copy of the Permit referred to and set forth in Paragraph I hereof.”

And Plaintiff’s Response thereto was: “Yes.”

That Defendants’ Demand numbered III was as follows:

“That on or about June 17, 1947, plaintiff, Howard Best, delivered to Reypo Corporation the sum of \$4,580.15, in the form of two checks, one for the sum of \$1,621.46, and the other for the sum of \$2,958.69.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand numbered IV is as follows:

“That on or about June 17, 1947, Reypo Corporation made, executed and delivered to the plaintiff a receipt for the said sum of \$4,580.15 referred to in Paragraph III hereof, which said receipt is in words and figures, as follows:

“That the receipt is:

“6/17/47.

“Received from Howard T. Best, 4580.15—for which Reypo Corp. note will be immediately issued for 30 days—with interest at 6%.

“REYPO CORPORATION,
“H. A. POWIS,
“Pres.” [35]

That Plaintiff’s Response to Defendants’ Demand numbered IV is as follows: “Yes.”

That Defendants’ Demand numbered V is as follows:

“That on or about June 25, 1947, plaintiff delivered to Reypo Corporation the sum of \$5,419.85.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand numbered XXXV is as follows:

“That at the times in June, 1947, that Plaintiff delivered to Reypo Corporation the moneys aggregating the sum of \$10,000.00 as set forth in Paragraphs III, IV and V hereof, Plaintiff knew that said moneys were to be used by Reypo Corporation for corporate purposes and would not be impounded.”

That Plaintiff’s Response thereto is in part as follows:

“Plaintiff knew that the moneys were to be used by Reypo Corporation for corporate purposes * * *”

That Defendants’ Demand numbered VI is as follows:

“That on or about June 25, 1947, Reypo Corporation made, executed and delivered to the plaintiff its promissory note, of which the following is a true and correct photostatic copy:”

That the photostatic copy of said promissory note is in words and figures as follows, to wit:

“\$10,000.00.....June 17, 1947

“Thirty days after date without grace we promise to pay to the order of Howard T. Best Ten Thousand & 00/100 Dollars, for Value received, with interest from date at the rate of 6 per cent per annum until paid. Principal and interest payable in Lawful Money of the United States, at Santa Monica, California, and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the [36] Court may adjudge reasonable as Attorney’s fees in said suit.

“REYPO CORPORATION,

“A. E. TIERNEY,

“Secretary.

“No. 10.”

That Defendants’ Demand numbered VII is as follows:

“That the said promissory note, described in Paragraph VI hereof, was delivered to plaintiff in return for the sum of \$10,000.00 delivered by plain-

tiff to said Reypo Corporation at the times and in the amounts referred to in Paragraphs III and V hereof."

That Plaintiff's Response thereto is: "Yes."

That Defendants' Demand numbered VIII is as follows:

"That the promissory note set forth in Paragraph VI hereof is the document referred to in paragraph 7 of Plaintiff's First Amended Complaint as a 'document purporting to be the promissory note of said corporation in the sum of \$10,000.00,' and is the same document referred to by Plaintiff in paragraph 8 of Plaintiff's First Amended Complaint as the purported promissory note delivered to Plaintiff to serve as a receipt."

That Plaintiff's Response thereto is: "Yes."

That Defendants' Demand numbered IX is as follows:

"That the said promissory note hereinabove referred to and set forth in Paragraph VI hereof, was in the possession of Plaintiff until some time between December 23 and December 30, 1947."

That Plaintiff's Response thereto is: "Yes."

That Defendants' Demand numbered XI is as follows:

"That on or about the following dates the Plaintiff, Howard Best, loaned to Reypo Corporation the following sums of money:

“December 9, 1947.....	\$ 650.00
“December 11, 1947.....	1500.00
“February 2	800.00
“February 2	300.00”

That [37] Plaintiff's Response thereto is: “Yes.”

That Defendants' Demand numbered XII is as follows:

“That the following is a true and correct copy of a portion of the Loans payable records books of account, Account No. 6.5 of Reypo Corporation:”

That a photostatic copy of said account No. 6.5 of Reypo Corporation was attached to said Defendants' Demand and is herewith attached to this [38] affidavit.

ACCOUNT NO. 6.5

one day see

NET NO

תְּמִימָנָה וְמִתְּמִימָנָה

That Plaintiff's Response to said Defendants' Demand number XII is as follows: "Yes."

That Defendants' Demand number XIII is as follows:

"That the entries made in the Loans Payable accounts set forth in Paragraph XII hereof, beginning with the entry dated Dec. 9, 1947, and ending with the last entry dated Jan. 8, 1948, were written by and are in the handwriting of the Plaintiff."

That Plaintiff's Response to said demand is as follows: "Yes."

That Defendants' Demand number XIV is as follows:

"That between December 23 and December 30, 1947, Reypo Corporation made, executed and delivered to the Plaintiff, Howard Best, its check in the sum of \$10,000.00; that Plaintiff endorsed said check by writing on the back thereof the language hereinafter set forth, and that the said check and the said endorsement are in words and figures as follows": (There is attached hereto a photostatic copy of said check.)

(There is attached hereto a photostatic copy of the endorsement appearing on the reverse of said check.) [39]

44

try to keep Corp
Purchase price in line
for ~~Keep~~ Stock
Bert 63

26-A

That Plaintiff's Response to Defendants' Demand numbered XIV is as follows: "Yes."

That Defendants' Demand numbered XV is as follows:

"That after endorsing said check with the words, 'Pay to Reypo Corp. Purchase price in full for Reypo Stock Cert. # 63, Howard Best,' Plaintiff delivered said check to Reypo Corporation, together with a letter dated December 23, 1947, addressed to Reypo Corporation, and signed by Plaintiff, Howard Best, of which the following is a true and correct photostatic copy:

"December 23, 1947.

"Reypo Corporation,
"1233 Lincoln Blvd.,
"Santa Monica, Calif.

"Attention: Mr. H. A. Powis.

"Dear Mr. Powis:

"I acknowledge receipt of your check # 1076, dated December 23, 1947, in the amount of \$10,000.00 in payment of your note of June 17, 1947, for \$10,000.00.

"Referring to our recent discussions regarding an investment in Reypo Corporation, I hand you, herewith, the above-mentioned check endorsed in favor of the Reypo Corporation, in full payment for 10,000 shares of Common Stock of Reypo Corporation.

"I acknowledge receipt of Certificate # 63 for

10,000 shares of Reypo Corporation Stock dated December 23, 1947.

“Yours very truly,

“/s/ HOWARD BEST.” [40]

That Defendants’ Demand number XVI is as follows:

“That concurrently with the delivery to Reypo Corporation of the said check for \$10,000.00 duly endorsed by Plaintiff and the said letter dated December 23, 1947, both of which are hereinabove set forth, Plaintiff delivered to Reypo Corporation the promissory note set forth and described in Paragraph VI hereof.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand number XVII is as follows:

“That at or about the time that Plaintiff delivered the said check for \$10,000.00, the said promissory note for \$10,000.00 and the said letter dated December 23, 1947, which are hereinabove set forth and described, the Plaintiff received from Reypo Corporation its Certificate No. 63 for 10,000 shares of Reypo Corporation stock, dated December 23, 1947.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand number XXI is as follows:

“That Plaintiff became associated with Reypo Corporation as sales representative about June,

July or August, 1947, and continued that association until some time in the year 1948."

That Plaintiff's Response thereto is: "Yes."

That Defendants' Demand numbered XXV is as follows:

"That the following is a true and correct photostatic copy of Sheet No. D-36, Record of Checks Drawn in December, 1947, by Reypo Corporation, the original of which sheet is contained in the books of accounts and records of Reypo [41] Corporation:"

GENERAL LEDGER-DR.		GENERAL LEDGER-DR.	
ACCOUNTS PAYABLE	DEBT	ACCOUNTS PAYABLE	DEBT
NET AMOUNT NET OF CHECK AMOUNT PAID	DAY	AMOUNT IN FAVOR OF DRAWN FORWARD	DAY
ART H. ODELL & SONS, INC.			
5		257144	
6	10/10/1950	125	10/10/1950
7	10/10/1950	150	10/10/1950
8	10/10/1950	150	10/10/1950
9	10/10/1950	150	10/10/1950
10	10/10/1950	150	10/10/1950
11	10/10/1950	150	10/10/1950
12	10/10/1950	150	10/10/1950
13	10/10/1950	150	10/10/1950
14	10/10/1950	150	10/10/1950
15	10/10/1950	150	10/10/1950
16	10/10/1950	150	10/10/1950
17	10/10/1950	150	10/10/1950
18	10/10/1950	150	10/10/1950
19	10/10/1950	150	10/10/1950
20	10/10/1950	150	10/10/1950
21	10/10/1950	150	10/10/1950
22	10/10/1950	150	10/10/1950
23	10/10/1950	150	10/10/1950
24	10/10/1950	150	10/10/1950
25	10/10/1950	150	10/10/1950
26	10/10/1950	150	10/10/1950
27	10/10/1950	150	10/10/1950
28	10/10/1950	150	10/10/1950
29			
30			
31			
32			



That Plaintiff's Response to Defendants' Demand numbered XXV is as follows: "Yes."

That Defendants' Demand numbered XXVI is as follows:

"That the entries on said sheet or Account D-36, set forth in Paragraph XXV hereof, beginning with the entry showing check drawn in favor of Barker Bros. Grinding, under date of the 17th of December and ending with the last entry on said sheet showing check for \$10,000.00 drawn in favor of Howard Best in payment of 'Notes Pay June 17, 1947,' are in the handwriting of and were made by Plaintiff."

That Plaintiff's Response thereto is: "Yes."

That Defendants' Demand numbered XXVII is as follows:

"That the last entry on said Sheet D-36 for \$10,000 paid to Howard Best is a book entry made by Plaintiff to record the issuance to Plaintiff of check No. 1076 for \$10,000, dated December 23, 1947, and more particularly described and set forth in paragraph XIV hereof."

That Plaintiff's Response thereto is: "Yes."

That Defendants' Demand numbered XXVIII is as follows:

"That the following is a true and correct photostatic copy of Sheet No. R-15 of the Record of Cash Received for the month of December, 1947, as contained in the original books of account of Reypo Corporation": [44]

5	16173	1	Cedars Home. Pow. 474	10175
6	16539	1	Supplies Cle. Pow. 335	10339
7	23078	1	Bindings. Section Pow. 578	33078
8	970	5	Western Cle. Pow. 505	970
9	756	8	Winter off. Pow. 506	756
10	16539	9	J. D. Shuler. Pow. 347	16539
11	16042	8	Connect Autometic Pow. 430	16042
12	16190	9	Standard. Pow. 387	16190
13	650	9	J. C. Louis - Ober	650
14	11402	10	American Standard 473	11402
15	1900	11	Commerce Ave. 46 and 500	300
16	3271	12	Jack Home. Pow. 598	3271
17	13164	12	Belle - Carter. Pow. 661	13164
18	16233	12	Beverly Home Pow. 606	16233
19	16176	13	Edinburgh Home. Pow. 497	16176
20	16053	13	C. C. Richmond Pow. 501	16053
21	14755	13	Gen. C. Quartz - Inventory	14755
22	20112	15	Green Mass. Tool Pow. 580	580
23	19030	15	Long's Rest Home Pow. 610	19030
24	16206	15	Rehman - Kraum Pow. 303	16206
25	16242	15	Wood. Home. Pow. 507	16242
26	16535	15	Art. Baker Home. Pow. 509	16535
27	15795	17	Short Melle & Lee. Pow. 560	15795
28	400	19	W. L. Turner	400
29	13244	20	Scovill's Candy & Baking 562	13244
30	64397	21	Gray & Hamer 562	64397
31	18264	23	Westmont Co 563	18264
32	12873	24	Young's Metal Shapes 560	12873
33	113404	26	Independent. Pow. 607	113404
34	13264	26	Young's Canning 560	13264
35	13399	26	W. H. & H. Lee. Pow. 568	13399
36	18463	27	Whittem Electric Co. Pow. 607	18463
37	13398	27	Youn M. Carter " 572	13398
38	26928	29	W. H. & H. Lee. Pow. 579	26928
39	13264	29	Young's Canning 560	13264
40	13298	29	W. H. & H. Lee. Pow. 575	13298
41	13264	31	W. H. & H. Lee. Pow. 575	13264
42	13265	31	W. H. & H. Lee. Pow. 575	13265
43	4626	31	W. H. & H. Lee. Pow. 575	4626
44	10000	32	Standard. Pow. 607	10000



That Plaintiff's Response to Defendants' Demand XXVIII is as follows:

"The record set forth in this demand is a true and correct record. It does not, however, reflect cash received but merely cash entries made."

That Defendants' Demand number XXIX is as follows:

"That all of the entries on said Sheet No. R-15 set forth in Paragraph XXVIII hereof, beginning with the entry for the sum of \$158.95 under date of December 17, 1947, showing money received from H. W. Mills & Co., and ending with the last entry for \$10,000 under date of December 23, from Howard Best, are in the handwriting of and were made by Plaintiff."

That Plaintiff's Response thereto is as follows:

"This is an ambiguous demand. The record therein discussed is in the handwriting of the plaintiff."

That the permit of the Commissioner of Corporations issued to Reypo Corporation under date of December 17, 1946, as aforesaid, required and provided that the sale and issuance of any of its securities referred to therein would be "at par, for cash, lawful money of the United States."

/s/ MANLEY C. DAVIDSON.

Subscribed and sworn to before me this 18th day of September, 1952.

[Seal] /s/ ROSE BERGER,
Notary Public in and for
Said County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed September 25, 1952. [46]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION ON MOTION
TO DISMISS SECOND AMENDED COM-
PLAINT

The Second Amended Complaint is vulnerable to the motion to dismiss.

It is framed as an action for damages for Fraud and Deceit. The fraud is alleged to have occurred at the time of an alleged sale of corporate shares on or about June 17, 1947, and at the time of actual issuance of the stock later in the same year. Defendants' contention that the Statute of Limitations bars the action is good. Plaintiff pleads that he became a Director of the corporation January 6, 1948. On February 16th of the same year he was duly elected and qualified as Secretary-Treasurer and continued to hold said office thereafter. While holding these positions, he attended several meetings of [48] the Board during which the financial difficulties of the corporation were openly discussed.

The fraud allegedly perpetrated upon Plaintiff would have been discovered by any reasonably prudent person having the active part in the corporation's life which Plaintiff pleads was practiced by him.

The California Corporation Code 3001 and 3004 codifies the old law to the effect that a director has a right to inspect the books of a corporation. The duties of a director require him to be familiar with the affairs of the corporation, including the area of corporate activity wherein this Plaintiff claims he had been defrauded. See *Vertex Investment Company v. Schwabacher*, 57 Cal. App. 2d, 406.

There is no doubt that Code of Civil Procedure 338 contains the applicable statute of limitations. Whether subdivisions 1 or 4 apply here is not material because both prescribe a three-year limitation.

As this action was commenced more than three years after the alleged fraudulent acts, Plaintiff's only chance of overcoming the bar of the Statute lies in either showing a discovery of the fraud at a date after its commission and within three years prior to filing his complaint, or in alleging some facts which would toll the Statute. The facts relied upon to show a late discovery include those above noted from which the Court must find the exercise of due diligence, in the light of all pleaded facts, would have brought actual "discovery" to Plaintiff. " * * * 'Discovery,' within the meaning of the section, is deemed to take place when the Plaintiff in the exercise of due diligence should have learned the facts. * * * " (*Vertex Investment Company v.*

Schwabacher, 57 Cal. App. 2d, [49] 406, at 415, supra.) In Merchants' Ice & Cold Storage Co. v. Globe Brewing Company, 78 Cal. App. 2d, 618, the court, in discussing this section (338 C.C.P.), said, at Page 623:

“* * * to bring himself within it, the plaintiff is required to establish facts not only showing that he was not negligent in failing to make an earlier discovery, but also that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. * * *”

Further, the court, in discussing “presumptive knowledge,” said, at Page 624:

“* * * if the facts are presumptively within his knowledge, he will be deemed to have actual knowledge of their existence. * * *”

Plaintiff in the instant case had access to and duties concerning all the records and files recording stock transactions. Constructive or “presumptive” knowledge could not be more clear than on the pleaded facts. Upon the facts of the case, the Plaintiff did not act with due diligence or, as seems more likely, he actually discovered the facts and decided for some undisclosed reason not to act thereon. He had three years within which to seek redress but the right, lost by inaction, cannot be revived sufficiently to survive the plea of the Statute of Limitations.

There is nothing in the present record to suggest that the Statute was tolled. Because the possibility of some “tolling” situation remains, the Second Amended Complaint is dismissed but the action is

not. Plaintiff is allowed twenty days to amend. Unless a third amended [50] complaint be on file by the close of business January 23, 1953, the Court will dismiss the action.

The Motion for Summary Judgment is denied as moot.

The Motion to Strike is ordered off calendar.

Defendants will prepare an order of dismissal of the Second Amended Complaint.

Dated: This 31st day of December, 1952.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed December 31, 1952. [51]

United States District Court, Southern District of California, Central Division
No. 13,583-T Civil

HOWARD BEST,
Plaintiff,
vs.

HENRY A. POWIS, JEANNETTE M. REYNOLDS as Administratrix With the Will Annexed of the Estate of HARRY V. REYNOLDS, Substituted in the Place and Stead of HARRY V. REYNOLDS, and A. E. TIERNEY,

Defendants.

ORDER OF DISMISSAL

This cause having been heard on the motions of the defendants to dismiss the Second Amended Com-

plaint in the above-entitled action, and having been argued and submitted for decision, and it appearing to the Court that the said Second Amended Complaint fails to state a claim against said defendants upon which relief can be granted in that the alleged cause of action is barred by the statute of limitations, it is

Ordered, that the Second Amended Complaint herein be dismissed, and that plaintiff be granted up to and including [52] January 23, 1953, in which to file an amended complaint, and if plaintiff shall fail to do so the said action shall be dismissed with costs to said defendants.

Dated: January 7, 1953.

/s/ ERNEST A. TOLIN,
United States District Judge.

Approved as to form as provided under Rule 7.

Dated: January 6, 1953.

/s/ GEORGE R. MAURY,
Attorney for Plaintiff.

[Endorsed]: Filed January 7, 1953.
Judgment docketed and entered January 8, [53] 1953.

In the United States District Court in and for the
Southern District of California, Central Divi-
sion

No. 13,583-T Civil

HOWARD BEST,

Plaintiff,

vs.

HENRY A. POWIS, et al.,

Defendants.

ORDER DISMISSING ACTION

Whereas, the Court made its Order dismissing the Second Amended Complaint and granting permission to file a Third Amended Complaint on or before January 23, 1953; and

Whereas, plaintiff has not filed such Third Amended Complaint within the time prescribed by the Court's Order, and has not petitioned for an enlargement of time within which to do so:

The Court Does Now Dismiss This Action.

Costs taxed at \$48.73 favor Defendant Powis and \$20.00 favor Defendant Reynolds.

Dated: This 27th day of January, 1953.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed January 28, 1953.

Judgment docketed and entered January 29, [54]
1953.

[Title of District Court and Cause.]

**NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73-B**

Notice Is Hereby Given that Howard Best, the plaintiff in the above-entitled action, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain Order Dismissing Action dated the 27th day of January, 1953, and docketed and entered on the 29th day of January, 1953, and from all thereof, and from all intermediary adverse rulings of the Court.

Dated: February 26, 1953.

/s/ **GEORGE R. MAURY,**
Attorney for Plaintiff.

[Endorsed]: Filed February 27, 1953. [55]

[Title of District Court and Cause.]

DOCKET ENTRIES

Basis of Action: Complaint for Damages (\$10,000) for Fraud and Deceit in Sale of Corporate Securities in Violation of California Corporate Securities Act. [61]

* * *

10/24/51—Fld. Compl. for Dmgs. for Fraud & Deceit in Sale of Corp. Securities. Issd. Sums. JS-5.

* * *

11/14/51—Fld. Mot. & Not. of Mot. to Dism., retble.
12/10/51 at 10 am.m. with Pts. & Auths.
thereof. Fld. Mot. for More Definite

Stmt. Fld. Dft. Reynolds Demand for Security for Costs. Placed Mot. for More Definite Stmt. on Cal. 12/10/51 for Hrg. & Notif. Counsel by phone.

11/28/51—Fld. Mot. & Not. of Mot. to Dism. of Dft. A. E. Tierney, retble. 12/10/51 at 10 a.m. with Pts. & Auths. thereon. Fld. Mot. & Not. of Mot. for More Definite Stmt. of Dft. A. E. Tierney, retble. 12/10/51 at 10 a.m. with Pts. & Auths. thereon. Fld. Demand for Security for Costs of Dft. A. E. Tirney. Fld. Mot. & Not. of Mot. of Dft. Henry A. Powis for More Definite Stmt., Retble. 12/10/51 at 10 a.m., & fld. Pts. & Auths. in Sup. thereof. Fld. Mot. & Not. of Mot. to Dism. of Dft. Henry A. Powis, retble. 12/10/51 at 10 a.m. & fld. Pts. & Auths. in Sup. thereof.

* * *

1/ 5/52—Fld. Plf's. 1st Amend. Compl.

1/ 7/52—Ent. Proc. on Hrg. Dfts. Sep. Mots. to Dism. for Failure to State a Claim, etc. Ent. Ord. that inasmuch as Plf. has Fld. an Amend. Complaint, [62] said Mots. are Ord. Off. Cal. Ent. fur. Ord. Dfts. have 30 Days fr. Today's Date in which to Plead to said Amend. Compl.

* * *

6/30/52—Fld. notice of rulg. on defts. mot. to dism. 1st amend. compl. htf. taken under subm. on 3/17/52 which is granted. Mld. copies to counsel.

7/ 1/52—Fld. for pltf. Howard Best request for leave to file second amended compl.

7/ 7/52—Fld. ord. dismissing 1st amended compl. & that pltf. be grntd. 30 days to file an amended compl. & if pltf. fail to do so then defts. have & recover costs of [63] suit.

* * *

7/28/52—Fld. second amended compl.

7/31/52—Fld. Stip. & Ord. thereon that Defts. hv. to 9/25/52 in wh. to ans. Pltf's. 2nd Amend. Complt.

9/24/52—Fld. Deft. Reynolds not. of mot. ret'ble 10/13/52, 10:00 a.m. mot. to dismiss sec-
ond & complt. & mot. for sum. jmt. Fld. pts. & auths. suppt.

9/25/52—Fld. defts. proposed summ. judgmt. Fld. defts. proposed findings of fact and concls. of law on granting of mot. for sum. jmt. Fld. not. of mot. of defts. Henry A. Powis and A. E. Tierney, retble. 10/13/52, 10 a.m., mot. to strike, pts. and auths. thereon. Fld. not. of mot. of defts Powis and Tirney, retble. 10/13/52, to dism. second am. complt. Fld. pts. and auths. support mot. to dism. second amd. complt. Fld. affid. Manley C. Davidson suppt. mot. to dism. Fld. affid. Henry A. Powis suppt. mot. to dism. Fld. affid. A. E. Tierney suppt. mot. to dism. [64]

* * *

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 65, inclusive, contain the original Second Amended Complaint for Damages for Fraud and Deceit; Motion to Dismiss Second Amended Complaint and Motion for Summary Judgment; Motion of Defendants Henry A. Powis, et al., to Dismiss Second Amended Complaint; Separate Affidavits of A. E. Tierney, Henry A. Powis and Manley C. Davidson in Support of Motion to Dismiss; Memorandum of Decision on Motion to Dismiss Second Amended Complaint; Order of Dismissal; Order Dismissing Action; Notice of Appeal and Designations of Record on Appeal and a full, true and correct copy of the Docket Entries which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23rd day of March, A.D. 1953.

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13773. United States Court of Appeals for the Ninth Circuit. Howard Best, Appellant, vs. Henry A. Powis, Jeannette M. Reynolds, as Administratrix With the Will Annexed of the Estate of Harry V. Reynolds, Substituted in the Place and Stead of Harry V. Reynolds and A. E. Tierney, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 24, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13773

HOWARD BEST,

Appellant,

vs.

HENRY A. POWIS, JEANNETTE M. REYNOLDS, as Administratrix With the Will Annexed of the Estate of HARRY V. REYNOLDS Substituted in the Place and Stead of HARRY V. REYNOLDS and A. E. TIERNEY,

Appellees.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

The appellant relies on one point only: The Lower Court misstated the law and erred in holding that

the cause of action stated in Plaintiff's Second Amended Complaint was barred by the Statute of Limitations.

Designation of Record

Appellant hereby designates the following as all of the record which is material to the consideration of the appeal:

- (1) The Second Amended Complaint of Plaintiff;
- (2) The Motion of Jeannette M. Reynolds to dismiss the Second Amended Complaint;
- (3) The Motion of Defendants Henry A. Powis and A. E. Tierney to Dismiss Second Amended Complaint;
- (4) The Order of Dismissal on granting of motion to dismiss;
- (5) Order dismissing action; and
- (6) Memorandum of decision on motion to dismiss Second Amended Complaint.

Dated: April 14, 1953.

/s/ GEORGE R. MAURY,
Attorney for Appellant.

Also Notice of Appeal, Clerk's Certificate.

[Endorsed]: Filed April 15, 1953.

